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CASE NOS.:	**2006-LHC-00805**	**2006-LHC-01536**
	2006-LHC-01537	**2006-LHC-01538**
OWCP NOS.:	**01-162870**	**01-161135**
	01-165285	**01-99405**

In the Matter of

W. B. [1]

Claimant

v.

ELECTRIC BOAT CORP
Employer/Self-Insured

Appearances:

David N. Neusner, Esq., Embry & Neusner, Groton, Connecticut for the Claimant

Edward Murphy, Esq., Morrison Mahoney LLP, Boston, Massachusetts for the Employer

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The present matter is a claim for workers' compensation and medical benefits filed by W.B. (the "Claimant") against Electric Boat Corporation ("EB" or the "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* ("LHWCA" or the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. See Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing, which was conducted before the undersigned administrative law judge on September 25, 2006, in New London, Connecticut. The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer. The District Director of the OWCP did not appear at the hearing. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant and from Micaela Black, a vocational rehabilitation counselor. The Hearing Transcript is referred to herein as "TR." Documentary evidence was admitted as Claimant's Exhibits ("CX") 1-25 and Employer's Exhibits ("EX") 1-24.[2] TR at 9-11, 15, 19,-22.[3] Formal papers were admitted without objection as Administrative Law Judge Exhibits ("ALJX") 1-18. TR at 23-27. Following the hearing, by letter dated November 13, 2006, the parties submitted Supplemental Stipulations which have been marked as Joint Exhibit ("JX") 1 and admitted. Thereafter, the parties filed post-hearing briefs ("Cl. Br." and "EB Br.", respectively), and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their arguments, I have concluded that the Claimant's lumbar spine condition was contributed to and aggravated by his employment at Electric Boat and the Claimant is entitled to compensation benefits for a temporary total disability beginning November 30, 2004.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At the hearing, the parties stipulated to the following: (1) the Act applies to the present claim; (2) an employer/employee relationship existed between the Claimant and EB at all relevant times; (3) the notice of controversion was timely; (4) no informal conference was held; and (5) the Claimant's average weekly wage for the 52 week period prior to the last day he worked at EB was $701. TR at 5-8.

Following the hearing, the parties filed Supplemental Stipulations which provide: (1) on November 17, 2004 the Claimant filed a Form LS-203 claim for compensation with OWCP for an October 16, 1980 back injury sustained in the course of employment at EB; (2) on June 15, 2006 the Claimant filed a Form LS-203 claim for compensation with OWCP for a January 23, 1985 injury to the back and right shoulder sustained in the course of employment at EB; (3) on November 17, 2004 the Claimant filed a Form LS-203 claim with the OWCP for compensation for an October 28, 1987 back injury sustained working at EB; and (4) on November 17, 2004 Claimant filed a Form LS-203 claim for compensation with OWCP for a June 21, 1996 back injury due to repetitive trauma sustained in the course of employment at EB. JX 1.

[2] The record was left open to permit the Claimant to submit the operative notes from his August 2006 back surgery which were not yet available, and to permit the Employer to submit the *curriculum vitae* for Dr. McLennan. TR 107. On October 3, 2006, Claimant submitted the operative notes from Dr. Paonessa, which have been marked CX 25 and admitted. On September 28, 2006, the Employer submitted Dr. McLennan's *curriculum vitae* which has been marked EX 24 and admitted.

[3] Claimant's objections to some of the Employer's exhibits were considered and overruled. TR 15-22.

The issues in dispute are: (1) whether the claim is barred by Claimant's settlement of claims under the State of Connecticut Workers' Compensation Program; (2) whether the notice of injury and claim were timely; (3) whether the Claimant's lumbar spine condition was caused by his employment at EB; (4) the nature and extent of any disability; and (5) whether the Employer is entitled to a Section 3(e) credit as a result of the State settlement.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

The Claimant was fifty-two years old on the date of the hearing. TR 28. He graduated from high school in 1973 and began working at Electric Boat as a pipe mechanic. TR 30. This position required him to operate press and rolling machines which involved maneuvering metal pieces weighing up to 100 pounds and to lift rings weighing approximately 40 pounds. TR 30-31. After two years, he transferred to the shipfitting department where he worked for thirteen years. TR 33.

As a shipfitter the Claimant worked mainly onboard ships that were under construction. TR 33-34. He installed foundations and his duties required the use of pneumatic bolt hammers to affix metal structures which formed the hull of the ship. He carried a tool bag weighing close to forty pounds. TR 46. His job also required him to carry materials which could weigh up to eighty pounds, to climb stairs to reach various levels in the ship and to carry materials to locations on the ship. TR 34-40. The installation work the Claimant performed on the ship also required him to work in confined spaces such as tanks. The Claimant reports that for a period of three to four years he worked mainly inside tanks in tight spaces installing gussets, grading clips or lighting rings. TR 41-46.

In October 1988, the Claimant transferred to the carpentry department. TR 44. In this position, he built staging and installed sound dampening. These duties required him to lift and carry lumber and sound dampening tiles which weighed up to 80 pounds for significant distances either across the yard or onboard the ships. TR 45-47.

The Claimant stated that he first began to experience back problems in the early 1980s. TR 40. On October 16, 1980, he injured his back lifting deck plates. TR 40; CX 11 at 1. The Claimant maintains that after this back injury his back was never 100 percent healthy and he experienced chronic aching and intermittent low back pain after this injury. TR 41. The Claimant said that big jobs requiring a lot of lifting would aggravate his back condition. TR 42. The Claimant hurt his back and right shoulder on January 23, 1985, installing an angle iron on a boat. CX 11 at 5. The Claimant reports that he experienced another back injury on October 28, 1987. TR 42-43; CX 10. He was out of work for two weeks and he treated with Dr. Falk, a chiropractor, after this injury. *Id.*; CX 11 at 11-14. The Claimant said that going into confined spaces hurt his back. TR 51.

The Claimant reports that he treated with various chiropractors and an orthopedic surgeon for back pain in the 1980s. TR 43; CX 11 at 6; CX 10. In the 1990's he saw his primary care physician, Barry Feldman, for back pain. TR 51; CX 9. The Claimant began seeing Dr. Paonessa, an orthopedic surgeon, for back pain in 2004. TR 52.

During his employment at Electric Boat, the Claimant suffered injuries to his hands, arms, neck and shoulder. TR 52. He was assigned permanent work restrictions for these injuries. On June 21, 1996, the Claimant was sent home as EB did not have work available for him within the restrictions imposed for these injuries. TR 53; EX 10. Subsequently, the Claimant was permanently laid-off on October 4, 1996, as the result of a reduction in force at the shipyard. CX 17. The Claimant never returned to work at EB. TR 53. [4]

On October 2, 1998, the Claimant settled claims involving injuries to the neck, shoulder, hands and arms pursuant to a settlement agreement under the State of Connecticut Workers' Compensation Program. EX 2. The Claimant signed a withdrawal of Longshore claims for the injuries coinciding with claims settled under the Connecticut compensation scheme. EX 1.

After leaving EB, the Claimant participated in a vocational retraining program for building maintenance. TR 67; CX 20. The Claimant worked maintenance at the Ahepa apartment complex for two years between 1997 and 1999. EX 15. He next worked at Twin Havens apartment complex from February 2000 to July 2004. EX 16.

The Claimant stated that by the summer of 2004 his back pain was significant, he was having difficulty picking things up, he began tripping on his right foot and found himself holding onto things to prevent a fall. TR 58-59. The Claimant saw Dr. Pasha and reports that Dr. Pasha reviewed x-rays of his spine, referred him to the hospital for an MRI, prescribed a course of physical therapy and told him he needed a surgeon. TR 59-60. Dr. Pasha referred the Claimant to his colleague, Dr. Paonessa, an orthopedic surgeon. TR 59. The Claimant also saw Dr. Mascaro, a chiropractor, during this period. TR 60. By June 2006 the Claimant reports he had pain in his back, and difficulty standing or sitting for any length of time. TR 62. After conservative treatment failed to improve the Claimant's lumbar spine condition he underwent back surgery on August 23, 2006. TR 61.

The Claimant acknowledges meeting with Micaela Black the Employer's vocational expert in June 2006. TR 62-63. He states that after he received her labor market survey report he applied for work at the businesses Ms. Black lists in her report. TR 63. The Claimant kept notes of his contacts and applications. TR 63; CX 15. The Claimant states that he was not hired at any of the companies where he submitted applications. TR 64-65. The Claimant admitted that he initially received a job offer from Ace Security, but when he told them he was going to have back surgery in a few weeks the offer was withdrawn. TR 65.

[4] EB paid the Claimant compensation benefits for a period of total disability from June 23, 1996 through July 6, 1997 as a result of a June 15, 1996 injury to the hands and arms. CX 18; EX 2. EB paid the Claimant compensation benefits for temporary partial disability for a February 15, 1996 injury to the hands and arms beginning on July 7, 1997. CX 18.

B. Micaela Black's Testimony - Vocational Expert

Micaela Black is a vocational rehabilitation counselor with a Master's degree in rehabilitation counseling. TR 82-83. She is employed by Concentra and states that she has performed many labor market surveys for EB. TR 83. In the present matter, Ms. Black stated that in preparing her labor market survey she reviewed the Claimant's and the Employer's exhibits, as well as the Claimant's deposition. TR 84. Ms. Black stated that she conducted a vocational assessment interview with the Claimant in the course of preparing her report. TR 85.

Ms. Black's June 13, 2006 labor market survey identified jobs she believed were consistent with the Claimant's education, work experience and were within the Claimant's work restrictions. TR 86; EX 11. She said that based upon her review of the medical records, the Claimant had a sedentary to light duty work capacity. TR 89. Ms. Black acknowledged that the terms "sedentary" or "light" are terms of art and she said a sedentary work capacity means an individual may lift up to 10 pounds and a light work capacity permits an individual to lift up to 20 pounds. *Id*. At the hearing, Ms. Black indicated that she no longer believed that the position at Jiffy Lube was appropriate as the position was too far from the Claimant's residence. TR 87. Ms. Black opined that the Claimant has an earning capacity between $8.00 and $12.00 per hour based upon the positions she identified in the labor market survey.[5] *Id*.

On cross-examination, Ms. Black admitted that the work restrictions she followed in identifying positions suitable for the Claimant were the work restrictions assigned by the three physicians who examined the Claimant at Electric Boat's request. TR 98. Ms. Black said that she did not have work restrictions from the Claimant's treating surgeon, Dr. Paonessa, in preparing the labor market analysis. *Id*. Ms. Black also acknowledged that the Claimant was not fit for the full range of either sedentary or light duty positions. TR 99-101. However, she said that based upon her employer contacts she nevertheless identified suitable jobs. *Id*. Ms. Black conceded that two positions she included in her report, the cage cashier position at Foxwoods casino and the customer service job at Defender required experience the Claimant did not possess. TR 95. Ms. Black was aware that the Claimant had undergone back surgery including a fusion, in the weeks just before the hearing, and yet would not say that the Claimant was totally disabled for some period following the surgery. TR 97.

C. Medical Evidence

1. Mohammad Pasha, M.D.

Dr. Pasha, of the Norwich Orthopedic Group, first saw the Claimant on August 23, 2004, on a referral from Dr. George Giffault. CX 4 at 3. Based upon his examination and review of x-rays recently taken, Dr. Pasha diagnosed significant degenerative disc disease at L-S1 with spondylolisthesis. *Id*. Dr. Pasha continued the Claimant on Celebrex, added Flexeril and prescribed a program pf physical therapy. CX 4 at 4.

[5] Ms. Black also testified that should I determine the date of injury to be 1996, the Claimant's earning capacity would have been between $5.44 and $8.16 per hour. TR 90-91.

Dr. Pasha next saw the Claimant on September 20, 2004. As the Claimant's condition had not improved and noting acute distress, Dr. Pasha ordered an MRI of the lumbosacral spine. CX 4 at 2. The Claimant returned on October 15, 2004. CX 4 at 1. Dr. Pasha noted the Claimant continued to have acute distress and the MRI revealed significant spondylolisthesis at L5-S1, and disc loss of more than 80% of height. *Id*. Dr. Pasha eventually referred the Claimant to Dr. Paonessa, an orthopedic surgeon, in his practice. *Id*.

2. Kenneth J. Paonessa

Dr. Paonessa first saw the Claimant on October 25, 2004, for chronic back pain and weakness on referral from Dr. Pasha. CX 2 at 2. On November 22, 2004, the Claimant returned for follow-up. CX 3 at 5. This visit focused mainly of the Claimant's cervical spine and Dr. Paonessa reviewed the MRI of the cervical spine he had ordered. The cervical spine MRI showed significant degenerative C5-C6 and C6-C7 discs. *Id*. The note also states that Dr. Paonessa has received some medical documents from EB through the Claimant's counsel which indicate a report of injury on October 16, 1980 for back pain, records showing the Claimant was seen at the EB yard hospital in April 1986 for low back strain, and a billing statement from Dr. C.C. Glenney from 1982 mentioning lumbar spondylolisthesis. *Id*.

At the November 30, 2004 office visit, Dr. Paonessa's notes indicate that the Claimant reported that he first injured his back in the early 1980s when working for EB and suffered subsequent back injuries. CX 2 at 1. Dr. Paonessa diagnosed Grade I degenerative spondylolisthesis. *Id*. He stated that the Claimant probably needed surgery in order to reach a point of less discomfort, but he wanted to try another course of physical therapy along with medication first. *Id*. If this course of action does not work, Dr. Paonessa stated the Claimant would be a candidate for a fusion of the lower L5-S1 disc. *Id*. Dr. Paonessa said the Claimant was temporarily totally disabled as a result of his low back condition. CX 2.

Dr. Paonessa's office note of November 30, 2004 again states that he saw a 1982 billing statement from a Dr. C.C. Glenney which mentions spondylolisthesis of L5-S1 and he also saw medical reports showing treatment for low back pain in 1982, 1985 and 1987. CX 2 at 2. Thus, he stated that the Claimant had a history of back problems that appeared to begin in 1980 with his initial work injury. *Id*. [6]

On January 13, 2006, Dr. Paonessa was continuing to recommend a fusion of the low back, but noted issues of insurance payment were delaying surgery. CX 3 at 1. The Claimant next saw Dr. Paonessa on April 19, 2006. Dr. Paonessa ordered a new MRI of the lumbar spine as his previous lumbar spine MRI was almost two years old at that point. CX 14 at 1. On the Claimant's May 12, 2006 follow-up appointment, Dr. Paonessa, said the MRI showed L5-S1 foraminal stenosis and he told the Claimant he was a good candidate for a 360° fusion with anterior cage. CX 14 at 2.

[6] In the period January 14, 2005 to March 18, 2005, the Claimant also saw Dr. Mascarro, a chiropractor, for back pain. CX 5.

Dr. Paonessa, along with Dr. John Weslock, a surgeon, performed the back surgery on August 23, 2006. CX 25. The surgery included a spinal fusion with insertion of instrumentation. *Id*.

3. S. Pearce Browning, MD

The Claimant treated with Dr. Browning from 1996 to 1998. CX 8. During this period he reported and was treated mainly for a cervical spine or neck condition although he reported his lumbar spine bothered him. CX 8 at 4; CX 22 at 29.

4. Dr. Falk

Dr. Falk a chiropractor treated the Claimant from 1984 to 1985. CX 10. His treatment focused upon the cervical and shoulder conditions. *Id*. Dr. Falk assigned work restrictions for several periods. *Id*. Although his treatment was mainly for the cervical spine condition, his progress notes on June 11, 1988 reflect that the Claimant reported pain over the L5-S1 area and the area was tender to touch. CX 10 at 8.

5. Electric Boat Medical Dispensary

The Claimant was treated for low back strain at the Electric Boat medical facility on October 16, 1980. CX 11 at 1. He was seen again for low back strain on October 28, 1982. CX 11 at 2-4. On January 23, 1985 the Claimant re-injured his low back. CX 11 at 5-6. The Claimant next sought treatment at the yard facility for back strain on October 28, 1987. CX 11 at 7-11.

6. Philo F. Willetts, MD

Dr. Willetts performed an independent medical examination at the Employer's request on August 31, 2005. EX 4.[7] In his August report, Dr. Willetts noted what he termed inconsistencies during his examination. EX 4 at 13-14, 18, 19. After reviewing the Claimant's medical treatment, diagnostic studies including an MRI and x-rays of the lumbosacral spine and his examination, Dr. Willetts diagnosed the Claimant with long preexisting spondyloysis L5-S1. EX 4 at 17. Dr. Willetts opined that the Claimant's low back condition was not related to remote events at Electric Boat in the 1980's. EX 4 at 18. Dr. Willetts opinion is based upon several factors including the fact that he did not see any medical treatment records from the 1980's, and when he examined the Claimant in 1996 for neck and bilateral hand conditions the Claimant did not reference any low back pain at that time. *Id*. Additionally, Dr. Willetts concluded that back incidents in the 1980s were only recently linked to his current back complaints when he sought treatment from Dr. Paonessa. Thus, Dr. Willetts stated that the current back condition "more likely represents the original preexisting spondylolisthesis and gradual degeneration with possible re-injury over the past year or so…[during which the Claimant was working building maintenance at an apartment complex.]" EX 4 at 18. Dr. Willetts indicated that the Claimant

[7] Dr. Willetts had previously performed an independent medical examination of the Claimant in 1996 for his neck and bilateral hand injuries. EX 6; EX 4 at 18.

was not at a point of maximum medical improvement as he was expected to have back surgery. *Id*. at 20.

Dr. Willetts prepared a second report on May 30, 2006, in response to additional records he was provided by EB and in response to specific questions from EB's attorney. EX 17. In this report, Dr. Willetts opined that the Claimant's reported back injuries in October 1980, 1984, 1985, 1987 and 1989 while working at EB may have aggravated his preexisting spondylolisthesis. EX 17 at 99-100. Dr. Willetts also stated that the work restrictions imposed for the Claimant in 1996 as a result of injuries to the neck, shoulder, hands and arms were still appropriate. EX 17 at 100. With regard to the Claimant's separate back condition, Dr. Willetts indicated the Claimant should limit lifting to 25 pounds, avoid frequent, repetitive bending or twisting and avoid working in low ceiling, tight compartments. EX 17 at 100.

7. James J. Yue, MD

Dr. Yue conducted an independent medical evaluation of the Claimant at the Employer's request on April 27, 2005. EX 20. Dr. Yue's examination was focused on the Claimant's cervical spine and he was asked to address the issue of whether the Claimant was a candidate for fusion surgery of the cervical spine. EX 20 at 122-123. Although he was not asked to evaluate lumbar spine issues, Dr. Yue noted that the MRI of the lumbar spine showed grade 1 or grade 2 L5-S1 spondylolisthesis. EX 20 at 123.

8. James E. McLennan, MD

Dr. McLennan, a neurosurgeon, performed a records review on behalf of the Employer on June 1, 2006, but he did not examine the Claimant. EX 19. Dr. McLennan concluded that the Claimant's lumbar spine spondylolisthesis grade 1, is degenerative. EX 19 at 120. He also opined that the low back condition is not related to the Claimant's employment at Electric Boat because the Claimant functioned well for 15 years after his most recent back injury of 1987, and he worked two other maintenance jobs after leaving Electric Boat. EX 19 at 117, 120.

D. Whether the Settlement Under the State of Connecticut Workers' Compensation Program Bars the Current Claims

On October 2, 1998, the Claimant settled claims involving injuries to the cervical spine, both shoulders, hands and arms under the Connecticut Workers' Compensation Program. The Employer concedes that the Claimant's claim for repetitive trauma injury to his back was not specifically included in the Connecticut settlement or in the withdrawal of federal longshore claims. EB Br. at 18. However, the Employer argues that it has "always been understood and agreed by the parties that such settlements encompass all liability of Electric Boat for all known injuries other than perhaps trivial ones." *Id*. The Employer asserts that permitting the belated repetitive trauma claim will have a chilling effect on future settlements as it would encourage employees with settled cases to bring later repetitive trauma claims against Electric Boat

regardless of the inclusiveness of the settlement documents or the amount of money paid in the prior settlement.[8] *Id.*

The Claimant argues that the Connecticut settlement which was approved by the Workers' Compensation Commissioner applies to and encompasses the injury dates and injuries specifically referenced in the settlement. Noting that the EB yard hospital records showed that the Claimant sustained injuries to the lumbar spine and other body parts which were not included in the state settlement, and the absence of language in the state settlement indicating the parties intended to preclude the Claimant from seeking compensation for any injuries other than those enumerated for his neck or cervical spine, shoulder, hand and arms, the Claimant asserts that the state settlement does not bar his claims for low back injuries. Cl. Br. at 7-8. The Claimant also contends that Section 8(i) of the Act, 33 U.S.C. §908(i), is the mechanism for settling claims under the Longshore Act and the Connecticut settlement was not approved by an administrative law judge from the Department of Labor's Office of Administrative Law Judges pursuant to Section 8(i). Finally, the Claimant argues that the withdrawal of Longshore Act claims, which includes claims corresponding to the dates of injury specifically outlined in the state settlement, is a nullity as the procedures set forth in the regulations at 20 C.F.R. 702.225(a) to effect a valid withdrawal were not followed.

The state settlement explicitly settles injuries to the Claimant's cervical spine/left shoulder on December 4, 1989, cervical spine/left shoulder on November 17, 1995, both hands/arms on February 15, 1996, left shoulder/cervical spine on February 27, 1996, both hands/arms on June 13, 1996 and right shoulder/both hands/arms on June 21, 1996. EX 2 at 2. None of the injury dates or injuries specified in the settlement included injury to the lumbar spine. In addition, as the Claimant argued in opposition to the Employer's motion for summary decision, the notes from the attorney representing him at the time of the state settlement, and a letter to the Workers' Compensation Commission show that the state settlement was based on calculations for the Claimant's partial loss of bodily function for injuries expressly listed in the state settlement. ALJX 12; EX 1; CX 19. These claims included only injuries to both hands, arms, shoulders, and cervical spine, but did not include injury to the lumbar spine. Thus by its express terms, the Connecticut settlement does not include injuries to the lumbar spine.

In *Clark v. Newport News Shipbuilding & Drydock Company*, 33 BRBS 121 (1999), the Benefits Review Board held that a settlement agreement under Section 8(i) of the LHWCA settling claims for injuries to the back, left knee and left groin and which included a statement that the settlement included all outstanding issues which "were raised or could have been raised" and discharged the Employer "from any and all liability" for "any further compensation past, present or future and future medical benefits" did not preclude a later claim for a right knee injury. *Clark*, 33 BRBS at 124. The Board held that the settlement agreement was limited to the claims then in existence and concluded that inclusion of an additional injury not specified in the

[8] The Employer's brief does not assert that the Claimant's claims for traumatic back injuries on October 16, 1980, January 23, 1985 and October 28, 1987 are barred by the Connecticut settlement. However, the Employer filed a motion for summary decision which I denied contending that the back injuries which existed at the time of the Connecticut settlement were included in the settlement. ALJX 12. Thus, it appears the Employer is claiming that all of the low back injury claims herein are barred by the Connecticut settlement and the withdrawal of claims signed by the Claimant. The Claimant also understood the Employer to be making such an argument. Cl. Br. at 7.

Section 8(i) settlement agreement was not consistent with the statutory requirement for settling claims under the Act. *Clark*, 33 BRBS at 125. If an injury is not specifically addressed in the settlement, the District Director cannot approve the adequacy of the settlement for that injury. *Id.* Therefore, unless a settlement explicitly addresses a specific injury it will not preclude a subsequent claim for an injury that was not in existence at the time of the settlement or that was not specified in the settlement documents. The Employer has not attempted to distinguish *Clark*, the controlling Board authority. Accordingly, I find that the instant claims for low back injuries are not barred by the state settlement of claims for other injuries.

Finally, the Employer's argument that the Claimant withdrew all of his LHWCA claims per the "Withdrawal" of September 24, 1998 also fails. EB Br. 18.[9] Section 15(b) of the Longshore Act and the implementing regulation at 20 C.F.R. 702.225(a) prohibit waiver of a claim, unless the parties gain approval of the District Director of the Office of Workers' Compensation Programs. The Employer has not offered any evidence that the withdrawal was presented to the District Director or that the District Director approved the withdrawal of Claimant's Longshore Act claims. Therefore, I find that no withdrawal of claims was perfected and, therefore, the Claimant's low back claims are not barred.

E. Timeliness of Notice of Injury – Section 12

Pursuant to Section 12(a) of the Act, an employee is required to report notice of injury within thirty days after the date of such injury, or thirty days after the employee is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of a relationship between the injury and the employment. 33 U.S.C. § 912(a). *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir.1979). The purposes behind the timely notice requirement include providing for effective investigations of injurious working conditions and effective medical services, and preventing fraudulent claims. *See Port of Portland v. Dir., OWCP*, 932 F.2d 836, 841 (9th Cir. 1991); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 152 (3d Cir.1975). Under Section 20(b) of the Act, 33 U.S.C. §920(b), the presumption is that sufficient notice of a claim has been given. The burden rests with the Claimant to establish timely notice. *Bivens*, 23 BRBS 233. Under Section 12(d)(2), failure to give timely written notice does not bar a claim if the claimant shows either that the employer had knowledge of the injury during the filing period or that the employer has not been prejudiced by the delay. *See Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *on recon*, 18 BRBS 151 (1986); *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, (9th Cir. 1998); *I.T.O. Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, (5th Cir. 1989).

The Claimant sustained traumatic injuries to the low back on October 16, 1980, January 23, 1985, and October 28, 1987, which he reported to the yard hospital on the date of each injury. CX 11 at 1, 5, 7. Therefore, the Claimant provided timely notice of injury for the three traumatic injuries and the Employer was aware of the injuries within 30 days as required by Section 12(a) of the Act.

[9] The Employer does not discuss or explain its assertion that the withdrawal of Longshore claim bars the present claims.

With regard to the claim for repetitive trauma to the lumbar spine in 1996, it appears that the Claimant did not give notice of this claim until November 17, 2004.[10] JX 1. However, the Claimant argues that the condition causing the Claimant to file the repetitive trauma claim was degenerative spondylolisthesis which was first diagnosed by Dr. Pasha on August 23, 2004, and first connected to the Claimant's work activities at Electric Boat by Dr. Paonessa on November 30, 2004. Cl. Br. at 12. The Claimant contends that he was not aware that repetitive trauma was a cause of his back condition before Dr. Paonessa's opinion on November 30, 2004. Therefore, the Claimant asserts he provided timely notice of injury by filing a Form LS 203 claim for injury on November 17, 2004. *Id*. The Employer argues, citing the Claimant's testimony, that the Claimant knew in 1996 when he was laid off that his back condition was due to his employment at Electric Boat. EB Br. at 14-15; TR 76. The Claimant also admitted that at the time he entered the settlement of his State claims in September 1998 he knew he had a back problem that was caused by his work at Electric Boat. TR 77. Upon consideration of the Claimant's testimony, I find that the Claimant was aware in 1996 that his low back condition was caused or aggravated by his work at Electric Boat. Accordingly, the claim for repetitive trauma to the lumbar spine in 1996 is untimely.

As noted above, the failure to provide timely notice pursuant to Section 12(a) will bar a claim if the employer shows it is prejudice by the delay. 33 U.S.C. §912(d)(1994). Therefore, "[t]o establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to [the] claimant's failure to provide timely notice pursuant to Section 12." *Steed v. Container Stevedoring Co*., 25 BRBS 210, 216 (1991); *see also Kashuba*, 139 F.3d at 1275-1276; *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 689-690 (9th Cir. 1997), *citing* 1A *Benefict on Admirality* § 71b, at 4-20 to 4-21 (7th ed. 1997); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999); *Williams v. Nicole Enterprises*, 21 BRBS 164 (1988). A conclusory allegation of prejudice is insufficient to meet the employer's burden of proof. *Kashuba*, 139 F.3d at 1276.

In the present matter, the Employer states that it is prejudiced as it must defend a claim in which the Claimant contends he sustained various traumas and engaged in heavy lifting over a twenty year period between 1974 and 1996. The Employer fails to provide an explanation of how the delay in notice of injury has impeded its ability to investigate hazardous working conditions, or to provide medical care or obtain a second opinion on the Claimant's back condition. In fact, the Employer was able to obtain additional opinions regarding the lumbar spine condition. On the evidence before me, I find that the Employer failed to establish prejudice. Accordingly, the Claimant's back injury claims, including the claim for repetitive trauma are timely and are not barred.

F. Timeliness of Filing Claim - Section 13-

Section 13(a) of the LHWCA states that the right to compensation for disability shall be barred unless the claim is filed within one year from the time the claimant becomes aware, or in

[10] The Claimant asserts that he gave notice by filing a Form LS 203 claim for injury on November 17, 2004, and the parties stipulated to the same. Cl. Br. at 12; JX 1. Neither party submitted the LS 203.

the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a). *See Spear v. General Dynamics Corp*., 25 BRBS 254 (1991). It is firmly established that the initial burden is on the claimant to show that the filing of the claim was done within Section 13's prescribed time. *Romaniuk v. Locke*, 3 F.Supp 529 (D.N.Y. 1932). To satisfy his initial burden, Claimant contends that the one-year statute of limitations, outlined in Section 13 of the Act, did not begin to run until the date Claimant became aware of the full character, extent, and impact of the injury including impairment to his earning capacity. Cl. Br. at 13-15. *See Paducah Marine Ways v. Thompson*, 82 F.3d 130 (6th Cir. 1996).[11]

The Employer asserts that the Claimant was aware in 1996 when he was laid off that his back condition was caused by his work at Electric Boat. EB. Br. at 16-17. Employer further states that at the time the Claimant settled his state claims in 1998 he knew he had a back condition caused by his work at EB. *Id*. Finally, the Employer maintains that by 1997 the Claimant knew that his earning capacity was diminished because he had to leave his employment at Johnson's Hardware for back and neck pain. *Id*.

I have previously determined that the Claimant was aware in 1996 when he was laid off that he had a back condition that was caused by his work at Electric Boat. I found further that the Claimant knew in 1998, when he entered the state settlement, that he had a back condition which was related to his work at the shipyard. Thus, in order to prevail, the Claimant must show that he was not aware that his low back condition impeded his earning capacity.

The Claimant maintains that he did not become aware that his long term earning capacity was impaired by his low back condition until he was totally disabled by Dr. Paonessa as a result of the condition in 2004.[12] Cl. Br. at 14. In this regard, the Claimant asserts that as of September 5, 1996, he was on a leave of absence from Electric Boat as a result of injury to his neck, shoulder and hands and a lack of light duty work to accommodate restrictions from these injuries. *Id*. Therefore, the Claimant contends he was not disabled as a result of a low back condition when he left employment at EB. Conversely, the Employer argues that the Claimant had to leave his job at Johnson Hardware in 1997 as a result of back and neck pain and the Claimant knew he was earning "a lot less" at Johnson's than he earned at EB. EB Br. at 17 n10.

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[11] In *Paducah*, the Sixth Circuit noted that several other courts have construed Section 13(a), similarly stating "[a]though these courts have stated the test in different ways, they generally have held that the employee is aware of the full character, extent, and impact of the injury when the employee knows or should know that the injury is work-related, and knows or should know that the injury will impair the employee's earning power. *Abel v. Director, Office of Workers Compensation Programs*, 932 F.2d 819, 821 (9th Cir.1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27 (4th Cir.1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 294-95 (D.C. Cir.1990); *J.M. Martinac Shipbuilding v. Director, Office of Workers' Compensation Programs*, 900 F.2d 180, 183 (9th Cir.1990); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 296 (11th Cir.1990); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 1033 (D.C. Cir.1987); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141-42 (5th Cir.1984); *Cooper Stevedoring*, 556 F.2d at 274. *See also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir.1979) (interpreting identical language in 33 U.S.C. § 912, the LHWCA's notice provision)." 82 F.3d at 134.

[12] Thus, the Claimant is asserting a claim for temporary total disability beginning November 30, 2004. Cl. Br. at 15.

After careful consideration of the evidence, I find that the Claimant understood the reduction in his earning capacity when he took a leave of absence from EB in 1996 was the result of injuries to his neck, shoulder and hands as these were the injuries which required the leave of absence and the injuries for which EB informed the Claimant it was unable to accommodate with light duty later in 1996. There is no evidence showing that the Claimant was aware that the reduction in his earning capacity in 1996 or 1997 was the result of low back injuries. Nor is there evidence suggesting that the Claimant was aware that any reduction in his earning capacity in 1998, when he signed the state settlement, was due to low back injuries as opposed to the injuries to his cervical spine, shoulder and both hands which were the subject of the state settlement.[13] The Claimant worked full time as a maintenance person for AHEPA apartments from 1997 to 1999 and he reasonably believed that any reduction in his earning capacity was the result of the injuries he settled under the state workers' compensation program. EX 15; TR 72. Accordingly, I find that the Claimant was not aware that his low back condition permanently impeded his earning capacity until November 30, 2004, when Dr. Paonessa stated he was totally disabled at that point.

Relying upon Section 30(f) of the Act, 33 U.S.C. § 930(f), the Claimant also argues for the first time in its brief that the statute of limitations in Section 13(a) did not begin to run as the Employer did not demonstrate that it filed reports of injury after receiving notice of the four injuries at issue herein. Cl. Br. at 13-14.[14] The Employer maintains that the Claimant cannot raise Section 30(f) at this point as the Claimant failed to raise this argument either in his opposition to the motion for summary decision or at the hearing. EB Br. at 17. Alternatively, should the undersigned consider this defense now, the Employer requests an opportunity to submit evidence establishing that the Employer did file the required LS-202 forms after all of the reported dates of injury. *Id*. Upon consideration of the evidence, the motion for summary decision and the Claimant's opposition, the Claimant's Pre-Hearing statement, the Claimant's statements and assertions at hearing, and the parties' statement of issues at the hearing, I conclude that the Claimant never argued that the statute of limitations was tolled, pursuant to Section 30(f), because the Employer failed to file the required notice of injury forms. Nor has the Claimant provided any explanation for failing to raise this defense in a timely manner. Raising the defense for the first time in its brief is a surprise and deprives the Employer of any meaningful opportunity to counter the defense. Accordingly, I find that the Claimant is precluded from raising the 30(f) defense at this late date and has waived the Section 30(f) defense.

[13] The Employer states that Dr. Browning issued work restrictions in 1997 as a result of the Claimant's back condition precluding lifting more than 40 pounds and, therefore, contends that the Claimant was aware that his earning capacity was impeded at this point as consequence of his low back condition. EB Br. at 17. After reviewing Dr. Browning's reference to a lifting limit for the back in the context of his treatment of the Claimant in 1996 and 1997, it is not clear that Dr. Browning's reference to the back means the lumbosacral or low back area. *See* CX 22. A reading of Dr. Browning's treatment notes demonstrates that Dr. Browning's treatment was focused almost exclusively on the Claimant's cervical spine or neck area and not on his low back or lumbar spine. Thus, on this evidence, I can not conclude that Dr. Browning's note agreeing with a work restriction limiting lifting to 40 pounds because of the back means the lumbosacral spine rather than the cervical spine for which he treated the Claimant. Accordingly, I find that the evidence does not support the Employer's assertion that Dr. Browning issued work restrictions as a result of the Claimant's low back condition in 1997.

[14] Following submission of the briefs, on December 22, 2006, the Employer filed a motion to bar Claimant from raising 30(f) issue for the first time in it brief. On January 3, 2007, the Claimant filed an opposition to the motion.

G. Causation

The Second Circuit summarized the four stages that must be resolved in considering a claim for disability benefits under the Act in *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1982) ("*Volpe*"). The Second Circuit states:

> First, the claimant must show that he sustained an injury. *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978). Second, once an injury is established, a presumption arises that the injury was work related. 33 U.S.C. § 920(a) ("Section 20[a] presumption").[15] Third, the employer the must present substantial evidence to rebut the work-relatedness of the injury; if [it] does, the presumption disappears. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). Fourth, if the presumption . . . is rebutted, there still must be an evaluation of whether the evidence as a whole would justify a holding for the employer. *Parsons Corp. of California v. Director*, [*OWCP*], 619 F.2d 38, 41 (9th Cir. 1980).

Consistent with the Second Circuit's decision, an individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. §902(2); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001) (citations omitted); *Brown*, 194 F.3d at 4; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused the harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP (Riley)*, 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). In establishing that an injury is work-related, the claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-815 (9th Cir. 1966). "Under the 'aggravation rule,' where an employment-related injury combines with, or contributes to, a pre-existing impairment or

[15] 33 U.S.C. § 920(a) provides, "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary[,] . . . [t]hat the claim comes within the provisions of this Act. . . ."

underlying condition, the entire resulting disability is compensable. . . ." *Johnson v. Ingels Shipbuilding, Inc*., 22 BRBS 160, 162 (1989), *citing Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986).

Once a claimant establishes a *prima facie* case, the claimant has invoked the presumption. The burden of proof then shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); Merrill, 25 BRBS at 144; *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. Dist. Parking Mgmt Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; rather, it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier*, 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP*, 688 F. 2d 862 (1st Cir. 1982).

The Claimant testified that his duties at EB required him to lift and carry heavy materials, to work in confined spaces in awkward positions, and to climb ladders and stairs. The Claimant also testified persuasively, and the medical records from Electric Boat corroborate his testimony, that he suffered low back strains on October 16, 1980, January 23, 1985, and October 28, 1987, as a result of his work at the shipyard. Thus, I find that with regard to the three traumatic injuries, the Claimant has established working conditions which could have caused the harm. With regard to his claim of repetitive trauma as a result of his job duties, the Claimant testified that his work responsibilities at EB included repetitive bending twisting, heavy lifting and carrying of materials and prolonged work in confined spaces. The Claimant's testimony was not rebutted. In addition the Claimant's physician stated that his work contributed to the development of his low back spondylolisthesis. Therefore, the Claimant has shown that working conditions existed which could have caused, contributed to or aggravated his low back condition. Accordingly, I find that the Claimant has successfully invoked the presumption of causation pursuant to Section 20 of the Act for all four injury claims. 33 U.S.C. §920.

Once the claimant has established a *prima facie* case and invoked the Section 20(a) presumption, "the burden shifts to the employer to rebut the presumption with substantial evidence that the alleged harmful workplace condition did not cause, contribute to or aggravate the claimant's condition." *Am. Stevedoring Ltd.*, 248 F.3d at 65 (citation omitted); *O'Kelley*, 34 BRBS at 41. "Substantial evidence has been defined as 'more than a mere scintilla' of evidence; rather, it is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Howell v. Universal Maritime Serv. Corp.*, No. 93-4111, 1996 U.S. App. LEXIS 30023, at *7 (2d Cir. Nov. 18, 1996), *quoting Universal Camera Corp. v. National Labor Relation Bd.*, 340 U.S. 474, 477 (1951).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption also applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *O'Kelley*, 34 BRBS at 41 (citations omitted); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the claimant is not related to his employment. *O'Kelley*, 34 BRBS at 41, *citing Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

In the present case, the Employer relies upon the opinion of its medical expert, Dr. McLennan, to rebut the Claimant's *prima facie* case. EB Br. at 12-14. Dr. McLennan opined that the Claimant's spondylolisthesis was degenerative and was unrelated to his employment at Electric Boat. Although it discusses Dr. Willetts' two reports, the Employer appears to concede, and I find, that based upon Dr. Willets' second report in 2006, in which he acknowledged that the various injuries to the Claimant's back in the 1980's could have contributed a small amount to increase his preexisting spondylolisthesis, Dr. Willetts' reports are not sufficient to rebut the presumption. EB Br. at 13. After considering the evidence, I find that Dr. McLennan's unequivocal opinion that the Claimant's low back spondylolisthesis is not the result of his work at EB, is sufficient to rebut the presumption.

The Courts have determined that "if the employer offers evidence sufficient to rebut the presumption, [it no longer controls, and] all relevant evidence must be weighed to determine if a causal relationship has been established, with [the] claimant bearing the ultimate burden of persuasion." *Am. Stevedoring Ltd.*, 248 F.3d at 65 (citation omitted); *Del Vecchio*, 296 U.S. at 286-287. "As a fact-finder, the ALJ has the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence." *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (internal citations omitted). *See also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the ALJ to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390, 395-396 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483, 486 (1978); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413, 416 (1978). "An ALJ is nonetheless bound by the expert opinion of a treating physician as to the existence of a disability unless contradicted by substantial evidence to the contrary. Moreover, an ALJ cannot arbitrarily substitute his own judgment for competent medical evidence." *Pietrunti*, 119 F.3d at (2d Cir. 1997) (internal citations omitted). *See also Rivera v. Harris*, 623 F.2d 212.

In the present matter, all of the physicians agree that the Claimant has significant spondylolisthesis at the L5-S1 level. However, the physicians disagree as to the cause of the low back condition and therefore, it is necessary for me to determine which physician's opinion is more credible. The Claimant's treating physician, Dr. Paonessa, opined that, based upon medical records from Electric Boat showing back injuries in 1980, 1982 and 1987, recent MRI's and x-rays of the lumbar spine, and his examination and treatment of the Claimant, the Claimant's work activities contributed to the development of his low back condition. I am not persuaded by the Employer's assertion that Dr. Paonessa's opinion is not credible because he initially said the back condition was not related to the Claimant's work and then later indicated it was related. On

that point, on November 22, 2004, Dr. Paonessa initially stated "[i]t is more difficult, without having any X-rays or more information, to state the injuries in 1980, 1982, and 1986/1987 were significant contributing factors to his lower back condition." CX 3 at 6. However, on November 30, 2004, after reviewing additional records of treatment for low back injuries, Dr. Paonessa stated the Claimant had a history of chronic back problems which appear to have begun in 1980 with the initial work injury and continued to bother the Claimant through the end of his employment at EB in 1996. CX 2 at 2. The evidence shows that Dr. Paonessa concluded the Claimant's back condition was related to his work at EB after reviewing additional medical records, X-rays and treating the Claimant over several months.

After reviewing medical records of several back sprains while the Claimant worked at EB, the Employer's medical expert, Dr. Willetts, in his second report, acknowledged that the back strains may have aggravated the Claimant's pre-existing spondylolisthesis. EX 17 at 99-100. Thus, Dr. Paonessa and Dr. Willetts, who both examined the Claimant, agree that the Claimant's spondylolisthesis was contributed to or aggravated by his employment at Electric Boat.

Dr. McLennan is the only medical expert who states that the Claimant's spondylolisthesis is not related to his work at EB. Dr. McLennan did not examine the Claimant, he admitted that he had "very little information about the low back" other than Dr. Paonessa's reports, and it appears Electric Boat did not provide its yard hospital records showing the Claimant's several back strain injuries to Dr. McLennan when it asked him to review the Claimant's records and offer an opinion on causation. EX 19. Although he reviewed Dr. Willetts' first report, and appears to agree with the report, Dr. McLennan did not see Dr. Willetts' second report in which Dr. Willetts conceded that the Claimant's numerous back strains while employed at EB could have aggravated his pre-existing spondyloloisthesis. In addition, while Dr. McLennan concludes the spondylolisthesis was preexisting, he never addresses the question of whether the work conditions and low back injuries aggravated the underlying condition. For these reasons, his opinion is entitled to little weight. After careful consideration of the evidence I do not credit Dr. McLennan's opinion as it is not supported by the evidence. The opinions of Dr. Paonessa and Dr. Willetts are consistent with the medical records and I credit their opinions that the Claimant's low back condition was contributed to or aggravated by his employment at Electric Boat.

H. Nature and Extent of Disability

1. Overview

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and

his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity. In the present case, the parties appear to agree that the Claimant's disability is temporary. Thus, the issue in dispute is whether the disability is total or partial.

2. Extent of the Claimant's Disability

Generally, a disability may be characterized as either partial or total. A three-part test is employed to determine whether a claimant's disability is partial or total: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee, which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *Am. Stevedores v. Salzano* 538 F.2d 933 (2d Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Air America, Inc. v. Director OWCP*, 597 F.2d 773 (1st Cir. 1979); (*Legrow*), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). The claimant may also rebut the employer's showing of suitable alternate employment by demonstrating that he was precluded from working because of participation in an OWCP approved vocational rehabilitation program. *Louisiana Ins. Guar. Assoc. v. Abbott*, 40 F.3d 122, 127-129 (5th Cir. 1994).

The Claimant left the shipyard in 1996 as a result of injuries to his cervical spine, shoulders, hands and arms. He participated in vocational retraining in building maintenance through the Connecticut Workers' Compensation Program and found employment in that field. The Employer does not argue that the Claimant can return to his regular job at the shipyard. I find that the Claimant has demonstrated that he is unable to return to his regular duties at Electric Boat and therefore he has established a *prima facie* case of total disability.

Since the Claimant has established that he is unable to return to his regular job, the burden shifts to the Employer to establish that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience and education as the Claimant. This requires proof that there is a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job. To satisfy this burden, the Employer must show the "precise nature, terms, and availability of the job[s]." *Plourde v. Bath Iron Works*, 34 BRBS 45, 48 (2000) (citing *Legrow*, 935 F.2d at 434). The Employer contends that as of June 13, 2006, the date of the labor market survey by its vocational expert, Ms. Black, the Claimant has an earning capacity.

In the present matter, the Claimant's physician, Dr. Paonessa, did not assess specific work restrictions for the Claimant. However, as the Employer notes, Dr. Paonessa's progress reports varied from indicating the Claimant was disabled in November 2004 and January 2005 to partially disabled in January 2006. CX 3 at 5, 3, 1. The Employer argues that these terms are terms of art and that Dr. Paonessa's "duty status" notation as "permanent partial disability" on

the progress note for January 13, 2006, means the Claimant had an earning capacity. In my view the Employer overstates the issue. Dr. Paonessa is a physician, not a vocational expert, and he has no expertise in evaluating earning capacity. In the absence of specific work restrictions from Dr. Paonessa, I cannot conclude, with any clarity, precisely what his notation of permanent partial disability means in terms of an earning capacity. However, the change from disabled to partial disability certainly suggests that Dr. Paonessa believed that in January 2006, the Claimant had some work capacity.

Dr. Willetts stated that the work restrictions imposed for the Claimant in 1996 as a result of injuries to the neck and upper extremities were still appropriate limiting the Claimant's use of his hands overhead, vibration exposure, rapid, repetitive hand motion and cold temperatures without gloves. EX 17 at 100. However, he never states exactly what the work restrictions from 1996 encompass in their totality, and thus the precise work restrictions the Claimant had in 1996 are not entirely clear. With regard to the Claimant's separate back condition, Dr. Willetts indicated the Claimant should limit lifting to 25 pounds, avoid frequent, repetitive bending or twisting and avoid working in low ceiling, tight compartments. EX 17 at 100. Dr. Willetts work restrictions appear consistent with the diagnostic tests and medical records.

The labor market survey was completed before the back surgery. The Claimant indicated that he could stand and sit for only 10 minutes at a time. No physician has assigned work restrictions for sitting and standing. On this evidence, I can not find that the Claimant is limited to standing and sitting for 10 minutes at a time.

In preparing the labor market survey and identifying jobs she deemed suitable for the Claimant, Ms. Black conceded that she used the work restrictions assigned by Dr. Willetts. EX 11 at 1-2; TR 86, 98.[16] Ms. Black stated that, based upon the restrictions she reviewed from the doctors, the Claimant has a sedentary or light-duty work capacity. When asked to define what is meant by sedentary and light-duty, Ms. Black stated that a sedentary work capacity limits an individual to lifting up to 10 pounds and a light duty work capacity has a lifting limit of 20 pounds. She later admitted that in addition to lifting limitations the sedentary and light duty work capacities also include limitations on the amount of standing an individual can perform. Ms. Black also stated that the Claimant could obtain the jobs she identified given his work experience and his strong performance reviews regarding his work performance and his ability to interact well with others. TR 88.

The difficulty with the labor market survey is that it was conducted just weeks prior to the Claimant's significant back surgery on August 23, 2006.[17] At the time of the hearing in September 2006, the Claimant was totally disabled from any work by his surgeon as he was in the initial recovery phase following his surgery. No evidence was submitted as to the Claimant's

[16] Ms. Black acknowledged at the hearing that the job at Jiffy Lube was not suitable as it was too far from the Claimant's residence. TR 87.

[17] The Employer concedes that it has not shown the Claimant had an earning capacity from the date he left employment with Twin Havens. EB Br. at 18-19. Therefore, the Employer contends only that as of Ms. Black's June 13, 2006 labor market survey, EB has demonstrated that the Claimant has an earning capacity.

work restrictions following the surgery. Ms. Black was reluctant to acknowledge that the Claimant would be totally disabled during a recovery period after his extensive August 2006 back surgery which included a fusion with instrumentation. In my view, it is reasonable given the nature of the Claimant's back surgery and a common sense understanding of the effects of surgery, to conclude that the Claimant was totally disabled following his August back surgery. In the absence of any evidence as to his work capacity following recovery from surgery, I can not conclude that the Claimant has a work capacity after August 23, 2006.[18]

I must now consider whether the Claimant had a work capacity from the date of the labor market survey, June 13, 2006, to the date of his surgery on August 23, 2006.[19] Ms. Black identified several positions she deemed consistent with the Claimant's education, experience and work restrictions. I find that the position of cage cashier at Foxwood Casino is not suitable as it requires three to six months of cash handling experience which the Claimant does not possess. TR 95. Similarly, the call center customer service position at Defender is also unsuitable as the position requires that the individual "must have knowledge of boating equipment systems and marine electronics" which the Claimant lacks. *Id*.

The cashier position at Goodwill Industries involves general cashier duties including operating a cash register, making change, answering questions and the telephone. Ms. Black opined that the position was consistent with the Claimant's restrictions as there is the opportunity to change position. However, she never explained what accommodations would be made for the Claimant in the cashiering job at Goodwill. Therefore, I am unable to evaluate whether or not this position is suitable for the Claimant and consequently, I find it is not suitable.

Ms. Black also listed three front desk clerk positions as suitable for the Claimant. The positions at Mircotell Inn & Suites, Howard Johnson, and Courtyard Marriott, are essentially the same and require basic computer skills to utilize a system for checking guests in and out, answering the telephone, taking questions and providing information to guests. The positions can be performed using a stool. Thus, the positions are within the Claimant's work restrictions. The Claimant stated at hearing that he did not know how to type and does not use a computer for writing letters and sending e-mail. This testimony is inconsistent with resumes he has provided to prospective employers which explicitly state that he is knowledgeable in the use of IBM computers and Microsoft word. Thus, I do not credit the Claimant's assertions that he does not know how to use a computer. The hotels all offer training on the computer program used to check guests in. As these positions are consistent with the Claimant's education and work restrictions, I find they are suitable.

Ms. Black also identified a keno writer position at Mohegan Sun Casino as suitable position for the Claimant. The position indicates that prior cash handling experience is highly preferred. The Claimant does not have any experience handling cash and Ms. Black conceded that the Claimant would be at a competitive disadvantage as he did not have the experience the

[18] Of course, it is now several months post-surgery and should evidence of the Claimant's work capacity following his surgery become available, either party may seek modification of this decision pursuant to Section 22 of the Act.

[19] I will utilize the work restrictions from Dr. Willetts for this period as the Claimant's physician, Dr. Paonessa, stated the Claimant was partially disabled in January 2006 but did not assign any specific restrictions.

prospective employer preferred. TR 103-105. Thus, I find that this position is not a suitable alternate position for the Claimant.

Ms. Black indicated that the associate sales clerk position at Boater's World was suitable. In terms of the physical requirements of this position, Ms. Black reported the position involves alternating between sitting, standing and walking. She also stated the position required occasional lifting 15-20 pounds. This position appears to be consistent with the work restrictions imposed by Dr. Willetts and thus I find this position suitable.

The cashier position at Walmart appears to require standing. However, Ms. Black testified that she had placed an individual at Walmart as a cashier even though the individual required use of a stool. It appears that the cashier position was suitable during this period.

Ms. Black stated that the security guard position at Ace Security was suitable for the Claimant. Ms. Black explained that there are various security guard positions and some require sitting watching a monitor. She notes that the Claimant was initially hired by Ace, but the offer was withdrawn once Ace learned the Claimant was scheduled for surgery in a few weeks. Thus, I cannot conclude that this job was suitable.

I have found that the Employer identified suitable alternate employment as a hotel desk clerk, sales clerk, and cashier from June 13, 2006 to the date of his back surgery on August 23, 2006.

The Claimant can still prevail on a claim for total disability if he demonstrates that he made a diligent, yet unsuccessful, attempt to obtain that type of employment. In the present matter, the Claimant applied for all of the positions identified in the Employer's labor market survey. He was offered a security guard position by Ace, but the offer was rescinded once the Claimant informed Ace he was scheduled for back surgery later in the summer. The Claimant acknowledged that he also informed the other prospective employers that he was to have surgery in several weeks. Under the rather unique circumstances here where the Claimant was to have surgery, yet was also applying for positions in response to a labor market survey, it was not unreasonable for the Claimant to let potential employers know that should he be hired, he would be out of work for back surgery within a short time. Indeed, Ms. Black conceded that few employers would hire an individual with physical restrictions who was to undergo back surgery. After considering the evidence, I conclude that the Claimant diligently sought employment during the period in question June 13 to August 23, 2006, but was unsuccessful. Accordingly, the Claimant has established that he is totally disabled.

I. Is the Employer Entitled to a Credit Pursuant to Section 3(e) of the Act?

Section 3(e) of the Act provides for a credit against liability for "any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under this Act pursuant to any other workers' compensation law…." 33 U.S.C. 903(e). The Employer argues that because the state settlement concerned the Claimant's loss of earning capacity generally rather than a specific injury, and to prevent a miscarriage of justice by permitting the Claimant to

receive double recovery, it is entitled to a "dollar-for-dollar" credit on the sums paid under the state settlement. EB. Br. at 21-22. EB fails to cite any authority in support of its assertions.

I have previously determined that the state settlement was for injuries to the Claimant's cervical spine, both shoulders, hands and arms. *See also*, CX 19. The current claims are for injuries to the Claimant's lumbar spine. Therefore, I conclude that the current claims are not for the same injuries compensated by the state settlement. Accordingly, the Employer is not entitled to a credit against sums paid under the state program for injuries other than lumbar spine injuries.

J. Medical Care

Pursuant to Section 7 of the Act, the Employer remains responsible for providing reasonable and necessary medical care for the Claimant's work-related lumbar spine injuries. 33 U.S.C. §907(a); s*ee also Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163, 165-166 (5th Cir. 1993). As the lumbar spine injuries are related to the Claimant's employment with EB, the Employer is responsible for reasonable and necessary medical care for that injury.

K. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under Section 28 of the Act. *American Stevedores v. Salzano*, 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's counsel, Mr. Neusner, filed an application for attorney fees and costs on December 1, 2006. The application sought fees and costs totally $12,867.05 based upon an hourly fee ranging from $261 to $271 per hour for counsel services. Fee App. at 3. On December 22, 2006, Electric Boat's counsel, Edward Murphy, filed a "Limited Objection to Claimant's Fee Petition". Employer objects to the hourly fees of $261 and $271 sought by Claimant's counsel. On January 2, 2007, Mr. Neusner filed a Revised Attorney Fee Application seeking fees and costs totally $13,409.05. Rev. Fee Pet. Attch. at 5.

Pursuant to 20 C.F.R. § 702.132(a), counsel seeking an attorney's fee has the burden to produce a fee petition which is supported by a complete statement of the extent and character of the necessary work done. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90, 96 (1998) (*Parks*). In the present case, the Claimant's fee application meets the regulatory criteria by clearly spelling out the date of service, the service provided and by whom. The administrative law judge is thereafter required to consider the reasonableness of the fee requested in light of any objections raised by the Employer. *Id*. Section 702.132 of the regulations provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account (1) the quality of representation; (2) the complexity of the legal issues involved; and (3) the amount of benefits awarded. 20 C.F.R. § 702.132(a); s*ee also Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993) (amount of benefits only one factor considered).

In the present case, the Claimant's counsel seeks a fee and costs of $13,409.05 In his fee application, Claimant's counsel has charged an hourly rate ranging from $261.00 to $271.00. It appears that Mr. Neusner increased his fee from $261.00 to $271.00 beginning September 21,

2006. *see* Rev Fee Pet. Attch. at 4. The Employer objects to the hourly rate of $261.00 and $271.00 on the grounds that Benefits Review Board decision in *Blayman v. Electric Boat Corporation* found a rate of $250.00 per hour was an appropriate hourly rate for work in that case before the Board. Obj at 2. The Employer contends that a rate of $250..00 per hour is sufficient. *Id.* In *Blayman*, the BRB, *sua sponte*, determined that the proposed hourly rate of $261.00 for attorney's fees for services performed before the Board in that matter was excessive and the Board reduced the hourly rate to $250.0. BRB Nos. 06-0132 and 06-0132A (December 8, 2006).

I have previously noted that the Board's ruling in *Blayman* fails to provide a rationale for the finding that an hourly rate of $261.00 is excessive for services provided before the Board in that matter.[20] *see Baker v. Electric Boat Corp.*, No. 2007-LHC-00645 (July 26, 2007). In the absence of a rationale for the Board's reduction of the hourly rate to $250 for attorney fees in *Blayman*, I decline to follow an unpublished Board decision in reducing the hourly rate for attorney's fees to $250.00 in the present matter, which was vigorously litigated. In addition, recent decisions by administrative law judges in the Boston District of the Office of Administrative Law Judges have awarded an hourly rate of $261.00 for attorneys in the Connecticut region. *See e.g., Dawkins v. Electric Boat Corp.*, OALJ Nos. 2006-LHC-01765, 2007-LHC-00189 (Jan. 22, 2007); *Chandler v. Electric Boat Corp*., OALJ Nos. 2005-LHC-02251, 2005-LHC-02252 (Jan. 18, 2006). Accordingly, I sustain the Employer's objection, in part, and reduce Claimant's counsel's hourly rate to $261.00. I find that the rate of $261.00 per hour is well within the range of hourly fees charged by firms in Connecticut and I will award an hourly fee of $261.00 for services provided by Mr. Neusner. Beginning on September 21, 2006 to January 2, 2007, Mr. Neusner seeks fees for 32.25 hours of services he billed at $271 per hour. I will reduce the fee awarded for these 32.25 hours to $261.00 per hour. Therefore, I reduce the fee application by $322.50. (32.25 x $271 = $8739.75 – (32.25 x $261) $8417.25 = $322.50).

The revised fee application seeks to recover time spent by a paralegal for preparing the fee application. Time spent preparing a fee application is not compensable. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994) (Dec. on Recon.) (*en banc*). Thus, I will reduce the fee application by 0.25 hours or $19.25 sought for time spent preparing the fee application.

In sum, I have reduced Attorney Neusner's hourly rate of $271.00 to $261.00 for a total reduction of $322.50. I have also reduced the amount sought by an additional $19.25 for time spent Mr. Neusner's paralegal for preparing the fee application. Taking into account the aforementioned reductions, the total amount of the fee petition is reduced from $13,409.05 to $13,067.30

[20] The Claimant's revised fee petition fails to address the Board's *Blayman* decision.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer shall pay directly to the Claimant temporary total disability benefits at a rate of 66 2/3 percent of the Claimant's average weekly wage of $701.41 from November 30, 2004 to the present and continuing pursuant to 33 U.S.C. §908(b);

2. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment-related lumbar spine condition may require pursuant to 33 U.S.C. §907;

3. The Employer shall pay the Claimant's attorney, fees and costs totaling $13,067.30;

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts